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IN THE

Supreme Court of the United States

WALTER RALPH MABRY and
ANTHONY MICHAEL,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* CONSTRUCTION ASSOCIATION OF MICHIGAN AND MICHIGAN CONVEYOR MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITIONERS

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Pursuant to this Court's Rule 37.2, *amicus curiae* respectfully files this brief in support of the petition for certiorari.[1]

[1] Pursuant to this Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief *amicus curiae*, and their consent letters are on file with the Clerk's Office.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Construction Association of Michigan (CAM) is the oldest and largest regional construction association in North America. CAM has over 3,300 corporate construction companies as members. CAM's membership includes many of the construction industry's largest general contractors some of which have published sales figures in excess of a billion dollars. CAM's membership is comprised of general contractors, subcontractors such as mechanical, electrical and steel erection contractors, equipment suppliers, material suppliers, and architectural and engineering firms. CAM offers this diverse membership: health, disability and workers compensation insurance, a credit union; investment services; education and safety training; a monthly magazine, social events; and a labor relations service. It is through the labor relations program that CAM acts as a collective bargaining agent for employers. CAM, on behalf of those employers who have appointed CAM as their collective bargaining agent, negotiates labor contracts with unions representing carpenters, cement masons, laborers and operating engineers. Thereafter, CAM interprets and administers these labor contracts. Petitioners Mabry and Michael are not members of CAM. Further, CAM members are not bound by the views taken by CAM as *amicus*.

The Michigan Conveyor Manufacturers Association (MCMA) is an association of union equipment conveyor manufacturers. Its members employ union workers. As a service to its members it acts as the collective bargaining agent on behalf of employers. It negotiates labor contracts with unions representing operating engineers, iron workers, and millwrights.

MCMA also keeps its membership informed regarding changes with safety standards, economic conditions and laws which affect the manner how members conduct their business. Petitioners Mabry and Michael are not MCMA members. Further, the members of MCMA are not bound by the views taken by MCMA as *amicus*.

CAM and MCMA have a strong interest in any case that affects how they and their members conduct business in the construction industry. CAM and MCMA have a particularly strong interest in cases involving the interpretation of the settlement exceptions of the Taft-Hartley Act.

Further, CAM and MCMA believe that as associations which consist of union employers and acts as the employers collective bargaining agent and contract administrator, they must seek clarification when judicial opinions cause confusion or uncertainty.

The Sixth Circuit Court of Appeals Decision in *US v Walter Mabry, et al,* 518 F.3d 442 (6th Cir. 2008) removes the pre-existing safe harbor for good faith resolutions of commercial disputes between employers and labor officials provided by 29 U.S.C. section 186(c)(2). The *Mabry* opinion implants into the Taft-Hartley Act an undefined requirement that good faith resolutions of commercial disputes have, "some level of structure or formality" to avoid criminality.

Furthermore, the *Mabry* decision creates further confusion and uncertainty with respect to the Department of Labor's filing requirements for LM-10 and LM-30 forms for the reporting the transfer of "things of value". Prior to the *Mabry* decision, a private resolution of a bona fide dispute between a labor union official and/or employer need not be reported

on said forms. After *Mabry* one is unsure when the LM-10 and LM-30 forms should be filed. In the event the settlement lacks a sufficient level of formality and said forms have not been filed, potentially subjects a party to fines of not more than $10,000.00 or imprisonment of not more than a year, or both.

The uncertainty and confusion caused by the *Mabry* decision needs to be corrected. For the foregoing reasons, CAM and MCMA now files this amicus curiae brief in support of the petition for certiorari.

REASON FOR GRANTING THE WRIT

The Sixth Circuit Clearly Erred, And Created Confusion And Uncertainty In The Unionized Labor Construction Industry By Removing The Pre-Existing Safe Harbor For Good Faith Resolutions Of Commercial Disputes Between Employers And Labor Officials Provided By The Taft-Hartley Act, 29 U.S.C. §186(c)(2).

The Opinion and Judgment entered by the Sixth Circuit Court of Appeals on March 3, 2008 in *US v Walter Ralph Mabry, et al*, 518 F.3d 442 (6th Cir. 2008) does directly affect how associations, collective bargaining agents, administrators, employers of unionized labor and union officials conduct business.

To understand the gravity of the Sixth Circuit error, it is necessary to understand the basic operations of CAM and MCMA.

CAM is the larger of the two organizations, both in number of members and services provided. CAM is essentially the voice of the construction industry in the Great Lakes Region. It publishes and mails a high end monthly magazine to its members. CAM

also created and administers an annual construction expo for construction trade exhibitors. CAM through its magazine, website, e-mails and faxes, alerts its members to changes in the state and federal law which affect their business.

CAM also provides numerous services which members can elect to participate in or utilize. Said services include, but are not limited to, safety services; project bidding reports; education classes/ seminars; personal and commercial loans; social events (golf, bowling, annual meetings); financial planning; insurance programs (health, auto, home and workers compensation); Annual Construction Industry Expo; and CAM labor relation services, wherein CAM acts as the collective bargaining agent for its union employers and administrator of the negotiated contract.

MCMA is a specialty association comprised of unionized conveyor manufacturer employers. These members utilize MCMA as their collective bargaining agent and administrator of the negotiated contract. MCMA also keeps its members updated on changes with the law and safety requirements through an annual publication.

It is through all the foregoing commercial transactions that the Associations have had or could lead to bona fide disputes between CAM or MCMA and a union official.

First and foremost CAM and MCMA come in direct contact with union officials when acting as the employers collective bargaining agent during labor contract negotiations. Thereafter, CAM and MCMA administer these contracts. As part of the administration of the contracts, CAM and MCMA are

involved in the hearing of grievances. The aforedscribed negotiations and grievance hearings are typically stressful and emotionally charged. It is foreseeable that bona fide dispute between a CAM or MCMA negotiator and a union official could arise. Claims of assault, battery or slander could be alleged by one or both parties when negotiations and grievance hearings become too heated. There have been incidents of strong words and physical contact during grievance hearings involving other associations and union officials.

Secondly, CAM and MCMA by virtue of their employers agency position, come in contact with union officials when said officials participate in: Construction Industry Expo, social functions, education and training seminars, use the Association's credit union services for loans or mortgages, obtain insurance or advertize in the Association magazine. It is foreseeable a union official could suffer a personal injury, dispute an invoice, object to location of one's exhibit at a trade show, default on a loan or mortgage, or have a dispute over insurance coverage or take issue with location of an ad in CAM's magazine.

Thirdly, CAM's and MCMA's union employer members, could foreseeably become embroiled in a dispute with a union official. A union official would use only unionized companies to perform work at their residence. Assume a union official renovating a residence. It is easily foreseeable a dispute arising from the work could develop such as: a claim for extra work, non-payment, defective performance, personal injury. All of which are legitimate bona fide disputes.

Finally, CAM and MCMA endeavor to keep its membership informed with changes in the law which

affect how a company would conduct its business. Such updates would be conveyed to the members through seminars, classes, news bulletins, magazine articles, website postings and e-mails. The problem CAM and MCMA now have is that they do not know how to advise its members regarding settling bona fide disputes with union officials absent fraud or duress. Due to the Sixth Circuit's Opinion in *Mabry* there is now confusion and uncertainty in settling disputes.

Prior to the Sixth Circuit Court of Appeals Decision on *Mabry* all of the foregoing disputes could have been resolved knowing that a safe harbor existed in the Taft-Hartley Act 29 U.S.C. §186(c)(2). The pertinent section unambiguously states:

> 29 U.S.C. §186(c)(2):
>
> (c) Exceptions
>
> The provisions of this section shall not be applicable . . .
>
> (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; . . .

The Sixth Circuit Panel Majority in its analysis of the *Mabry* facts determined that the cited exception is ambiguous. It then went on to decide that the exception of 29 U.S.C. §186(c)(2) must be read to "require some level of structure or formality in resolving a dispute to evidence the legitimacy of the

ensuing payment". The panel majority then failed to define what degree of structure or formality is required to obtain the safe harbor benefits of §186(c)(2).

This ruling clearly causes confusion for Associations such as CAM and MCMA and its union employers in regards to settling bona fide disputes with union officials. In light of the majority panels' ruling should CAM, MCMA, union employers and union officials file a lawsuit, a demand for arbitration for each and every legitimate dispute which it seeks to settle so that it gives rise to a satisfactory level of structure or formality? The simple answer is no. Such a policy would burden already overloaded state and federal dockets; cause unnecessary expense to associations, unions and employers and slow the process of settlement to a snails pace.

It is the position of CAM and MCMA that the proper reading and interpretation of §186(c)(2) was proffered by *Mabry's* dissenting Judge Keith. Judge Keith in his dissent states:

> In other words, if Congress had intended to require union officials to initiate formal proceedings for the settlement exception to apply, Congress would have said so. The absence of the words "formal litigation" or "arbitration" and the insertion of the words "claim" and "dispute" into the second section of § 186(c)(2) suggests that Congress did not actually intend to require union officials and employers to engage in formal adjudicative processes to avoid criminal liability. The requirement was only that the claim and its settlement be bona fide, i.e., "in the absence of fraud or duress." Thus, the plain language of the statute together with the discernable congressional intent of § 186 suggest that § 186(c)(2), the

> settlement exception, should be read to allow the settlement of bona fide disputes between an employer and a union official as long as both the dispute and settlement are in the absence of fraud or duress. *United States v. Mabry*, 518 F.3d 442, 452 (6th Cir. 2008).

CAM and MCMA agree with Judge Keith's rationale. Informal settlements are protected by §186(c)(2) so long as these settlements are concluded in the absence of fraud or duress. If the *Mabry* decision is left to stand it will have a continuing and negative effect upon bona fide settlements. This *amicus* prays this Honorable Court correct the improper interpretation of §186(c)(2) by the majority panel in *Mabry*.

Unfortunately, the affect of the *Mabry* decision reaches even further. Under 29 U.S.C. §§432, 433 labor officials and employers are requested to report receipt of payment of things of value exchanged between them. A willful violation of this law can result in a fine up to $10,000.00 and a year in prison. See 29 U.S.C. §439. However, settlement payments pursuant to 29 U.S.C. §186(c)(2) are exempt from said reporting requirements. See 29 U.S.C. §§432(a)(6) and 433(a)(1)(B).

It appears nonsensical that the majority in *Mabry* would require "structure or formality" to settlements, where the Department of Labor does not. The *Mabry* decision creates confusion and uncertainty regarding resolution of disputes between union officials and employers. It needs to be rectified.

The *Mabry* decision as a matter of policy is a disaster. This Honorable Court should not allow the decision to stand. Accordingly, this Court should grant the Petitioners Writ.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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